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No. 05-259

FILED
SEP 22 2005

In the Supreme Court of the United States

BURLINGTON NORTHERN
SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade organization representing the Nation's major freight railroads and Amtrak. AAR's members operate approximately 78% of the rail industry's line haul mileage, produce 94% of its freight revenues, and employ 92% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the railroad industry, and with the likely consequences of the Sixth Circuit's decision in this case, will aid this Court's understanding of the issues presented here.

The establishment of clear and uniform guidance on the scope of federal employment discrimination law is of substantial concern to AAR's members. Because railroad operations are by their nature decentralized and widely dispersed, the employment practices of AAR's members will be evaluated under the prevailing case law of multiple federal circuits. In addition, AAR's members must rely on their supervisory personnel to oversee more than 170,000 rail employees and ensure the safe and efficient operation of the Nation's railroads in the first instance. Resolution of the disagreement among the federal courts of appeal on the appropriate standard for retaliation claims would allow AAR's members to adopt uniform employment practices and to predict with some certainty their exposure to Title VII liability for vesting critical discretion in their supervisory personnel.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Association of American Railroads states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

SUMMARY OF ARGUMENT

The lower federal courts all agree that a Title VII plaintiff must allege some genuinely concrete and material adverse employment action in order to bring a retaliation claim, so that employers and the courts are not inundated with federal lawsuits over trivial, day-to-day supervisory decisions. There is an entrenched and significant circuit split, however, over where to draw that line. The Sixth Circuit held in this case that an employee could bring a retaliation claim because her supervisor instructed her to perform one set of tasks—concededly within her job description—rather than a different set of tasks that she preferred and had become accustomed to performing. The Sixth Circuit also held that a temporary suspension can be the subject of a retaliation claim even if that suspension is later reversed by the employer, and even if the employee is reinstated *with full backpay*. Both holdings conflict with the settled law of other courts of appeals.

Large interstate employers need clear and sensible rules in this area of the law so that they can strike an appropriate balance between the need to vest reasonable discretion and authority in front-line supervisors and the need to protect the company from costly employment litigation. Conflicts and uncertainty in the law make it difficult for railroads to adopt uniform policies governing employees who frequently travel across state lines. An anomalous rule in one circuit can accordingly force changes nationwide. In addition, the decentralized and widely dispersed nature of rail operations and the possibility of catastrophic accidents mean that railroads have a particularly strong need to delegate effective and immediate supervisory discretion to supervisors in the field. The Sixth Circuit's decision in this case, however, makes it difficult and risky for a railroad to permit its supervisors to exercise ordinary supervisory authority over any employee who has ever complained about discrimination. That is not consistent with the efficient and safe operation of the Nation's railroads. AAR

therefore respectfully urges this Court to grant review, and to reverse the Sixth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S HOLDINGS IN THIS CASE CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

A. The Circuits Are Deeply Divided Over What Kinds Of Supervisory Decisions Can Qualify As "Retaliation" Under Title VII

As the petition for certiorari explains, there is widespread agreement that both the anti-discrimination and anti-retaliation provisions of Title VII must be interpreted to require some concrete and tangible adverse employment action, for otherwise the statute would invite federal litigation over every less-than-glowing performance review, or even over workplace slights as trivial as a supervisor's tone of voice. *See, e.g.*, *Fairbrother v. Morrison*, 412 F.3d 39, 56–57 (2d Cir. 2005) (evaluation of "unsatisfactory" performance insufficient to show adverse employment action absent evidence that evaluation "negatively altered [the plaintiff's] compensation, benefits, or job title"); *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999) (same).

There is, however, a deep and acknowledged split among the circuits over the threshold for showing an adverse employment action in Title VII retaliation cases. The courts of appeals are divided among at least three different standards. At one extreme is the Ninth Circuit, which has adopted the position of the Equal Employment Opportunity Commission ("EEOC") in finding an adverse employment action whenever the employer's action "is reasonably likely to deter the charging party or others from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1237, 1242–43 (9th Cir. 2000). At the other pole are the Fifth and Eighth Circuits, which read the plain language of 42 U.S.C. § 2000e-3(a) to require plaintiffs to show that their employers subjected them to "ultimate employment decisions" or "acts 'such as hiring, granting leave,

discharging, promoting, and compensating.'" *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707, 708–09 (5th Cir. 1997) (citation omitted); *see Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). This requirement echoes the standard this Court adopted for vicarious employer liability for sexual harassment in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760–61 (1998). In that case, this Court explained that the "tangible employment action" sufficient to support vicarious liability must be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761 (comparing *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993), with *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); and *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

The other circuits have adopted intermediate positions using nominally different standards. The Fourth Circuit, for example, requires "an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten v. Maryland*, 243 F.3d 858, 865–66 (4th Cir. 2001). Six circuits—the First, Second, Third, Seventh, Tenth and D.C. Circuits—require "a materially adverse change in the terms and conditions of employment." *Crady*, 993 F.2d at 136; *see Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 24–25 (1st Cir. 2002); *Fairbrother*, 412 F.3d at 56; *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Medina v. Income Support Div.*, 413 F.3d 1131, 1136 (10th Cir. 2005); *Brown*, 199 F.3d at 457. The Eleventh Circuit has adopted a variation on that theme, requiring plaintiffs to show "a *serious and material* change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (emphasis in original). The Sixth Circuit in this case viewed itself as joining those courts adopting an intermediate position. Pet. App. at 21a.

Even within the nominally "intermediate" position, however, there are relevant and substantial differences in the threshold of seriousness that the courts of appeals require before finding a "material" change in the terms and conditions of employment. For example, "'[p]erhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise,'" most courts have properly held "'that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.'" *Brown*, 199 F.3d at 451–52 (citation omitted) (alteration in original).

In *Crady*, the Seventh Circuit held that an employee's alleged "demotion" from an assistant vice president and manager position at one bank location to a loan officer position managing collections at another location did not constitute an adverse employment action, where the employee "would have maintained a management-level position at the same salary and benefits he was already receiving," and there was no showing that the employee's new responsibilities "were less significant than the responsibilities he previously enjoyed." 993 F.2d at 136; *see also, e.g.*, *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (reaffirming that job transfers without significant changes in responsibilities and work conditions are generally not actionable, but stating that material retaliation can occur in non-employment actions); *Harlston*, 37 F.3d at 382 ("Changes in duties or working conditions that cause no materially significant disadvantage" are insufficient.); *Flaherty*, 31 F.3d at 456; *Brown*, 199 F.3d at 455–56. The Seventh Circuit has similarly recognized that asking an employee to perform different *tasks* that are concededly within his or her current job classification is not a material adverse change in the terms and conditions of his employment. *See, e.g.*, *Conley v. Vill. of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (assigning maintenance employee to paint a pump room for an extended period of time was not an adverse employment action because "the

assignment seems to be well within the scope of normal activities for a Village maintenance worker").

In a similar vein, other courts have recognized that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury" under federal antidiscrimination laws. *Brown*, 199 F.3d at 457. Instead, federal courts have required "that the plaintiff has suffered objectively tangible harm." *Id.* Thus, an employee's perception that a reassignment "was more stressful" was insufficient to show discrimination, when the employee "suffered no diminution in her title, salary, or benefits." *Harlston*, 37 F.3d at 382; *see also, e.g.*, *Flaherty*, 31 F.3d at 457 ("[A] plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action."); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

The Sixth Circuit's decision in this case is clearly inconsistent with other circuits. Under the "ultimate employment decision" standard adopted by the Fifth and Eighth Circuits, there can be no doubt that Petitioner BNSF would have prevailed. Respondent's reassignment was not a change in the actual terms and conditions of her employment and her suspension was not an "ultimate" (*i.e.*, final) decision of the employer. The holding below is also inconsistent with the precedents of at least the Seventh and D.C. Circuits, discussed above, applying the intermediate "material adverse change" test to exclude mere "changes in assignments or work-related duties" that the employee subjectively considers less desirable. *See Brown*, 199 F.3d at 451–52. The rail supervisor's instruction to Respondent that she should focus on other tasks that were concededly within her job responsibilities—indeed, tasks she was already performing for a substantial part of the work day and were being performed by some of her more senior coworkers—was clearly nothing more than a task reassignment unaccompanied by any change in salary, work

hours, or job category. The Sixth Circuit's reasoning also reflects precisely the same undue regard for individual subjective perceptions rejected by other circuits. Indeed, it is far from self-evident that a dirtier and more physically demanding task is inferior to a cleaner and less tasking one. *See Ramirez v. City of San Antonio*, 312 F.3d 178, 180 (5th Cir. 2002) (employer allegedly discriminated "by transferring [the plaintiff] to a less-physically demanding position"). The bottom line, as the original Sixth Circuit panel observed, is that:

> The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her.

Pet. App. at 96a. Directing an employee to do her job cannot be actionable retaliation, even if that employee has become accustomed to performing tasks that she views as more desirable and to leaving the more onerous tasks to her coworkers. That common-sense insight would have prevailed, under various tests, if this case had been litigated in at least four other circuits.

The Sixth Circuit's decision demonstrates the significant conflicts and confusion among the federal courts, and the pressing need for this Court's review. There is no reason to believe that this conflict will resolve itself without this Court's intervention. The circuits are now entrenched in their respective positions, and the EEOC, for its part, advances an expansive standard that all circuits but the Ninth have declined to adopt. *See, e.g.*, Pet. App. at 18a (rejecting the EEOC's proposed test); *Von Gunten*, 243 F.3d at 863 n.1 (same). The lower courts will remain in disarray, and employers will be left without clear and uniform guidance on the requirements of federal law, until this Court grants review of the issues presented here.

B. The Sixth Circuit's Decision Further Conflicts With The Decisions Of Three Other Circuits That An Employer May Cure Otherwise-Adverse Employment Actions

The Sixth Circuit also added to the confusion in the lower courts by holding that a temporary suspension of an employee that is subsequently vacated (with backpay and no interruption in benefits) through the ordinary operation of the employer's internal processes is nevertheless an adverse employment action. As a threshold matter, this holding clearly conflicts with the decisions of the Fifth and Eighth Circuits, which have held that interim decisions subsequently corrected by the employer are not "ultimate employment decisions" and therefore do not constitute adverse employment actions. *See, e.g., Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998) ("We need not address whether a mere delay in promotion constitutes an adverse employment action because Benningfield received the promotion with retroactive pay and seniority."); *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 880–81 (8th Cir. 2005) (no adverse employment action because the plaintiff failed to pursue internal review process, and initial decision to deny tenure was never finalized).

The Ninth, Eleventh, and D.C. Circuits also have held that "[a]n employer may cure an adverse employment action . . . before that action is the subject of litigation." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action."); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) ("[T]he decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action. But when an employee loses pay or an

employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when the action is rescinded and backpay is awarded.") (citations omitted); *cf. Brown*, 199 F.3d at 458 (low evaluation not an adverse employment action because "such evaluations could be adjusted on appeal before a separate administrative branch," and "[a]lthough Brown clearly knew of this procedure, there is no evidence that she ever sought such an adjustment").

Thus, the D.C. Circuit held in *Taylor* that there was no adverse employment action resulting from an allegedly retaliatory performance rating the employee received, even though it had the effect of lowering the amount of the employee's bonus, because the employee's supervisor "corrected the evaluation and paid the proper bonus before [the employee] brought this suit." 350 F.3d at 1289–90, 1293–94. The plaintiff could not maintain her retaliation claim, the court held, because "there was no unremedied adverse employment action when the suit was filed." *Id.* at 1294. A contrary decision, the D.C. Circuit added, would frustrate an important goal of Title VII:

> Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.

Id. (quotation omitted); *see also Brooks*, 229 F.3d at 930 ("'To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.'") (quoting *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 546 (6th Cir. 1999)).

These decisions are in harmony with this Court's recognition in *Ellerth* that the use of an employer's "internal processes" plays a critical role in determining an employer's

Title VII liability, for it determines when a supervisor's allegedly discriminatory conduct becomes "an official act of the enterprise, a company act," and therefore an adverse employment action. 524 U.S. at 762. Consistent with Congress's intention that Title VII "encourage . . . effective grievance mechanisms" and "promote conciliation rather than litigation," intermediate acts that are not the final, "official act" of the employer are insufficient to support vicarious liability. *Id.* at 764. Such preliminary, tentative decisions should not constitute actionable retaliation either, for the same reasons.

In this case, it is clear that the employee's suspension was not the final, "official act" of the employer. Instead, it merely began an internal process that ultimately required the employer to render a final decision about the employee. That decision was to vacate the employee's suspension and award backpay for time away from work. In the end, the employer's process worked exactly as Congress hoped, and Respondent suffered no adverse employment action at all.

The Sixth Circuit relies on a prior decision of this Court holding that the pendency of an internal grievance process did not toll the statute of limitations on a Title VII claim, but that case does not remotely resolve this question. *See* Pet. App. at 23a (citing *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976)). First, this Court did not hold in *Robbins* that internal grievance procedures are irrelevant as a matter of law to determining when an adverse employment action occurs. (Indeed, because that case involved a termination, this Court had no occasion to decide how the pendency of a grievance proceeding affects preliminary decisions that fall short of actual termination.) Instead, this Court noted that the relevant statutory "occurrence" depends on the circumstances, including the parties' expectations and any contractual agreements that fix the occurrence of the triggering event. *See* 429 U.S. at 234–35; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002) (characterizing *Robbins* as concluding that the

discriminatory conduct occurred on "the date that the parties understood the termination to be final"). In that case, because there was "no indication that either party viewed the . . . discharge as anything other than 'final,'" this Court found no reason to adopt a later event as the relevant occurrence. 429 U.S. at 235.[2]

Second, the circumstances surrounding suspensions are fundamentally different from those surrounding terminations. *Cf. Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (recognizing the qualitative differences between terminations and suspensions without pay for purposes of a due process analysis and observing, "Unlike the employee . . . who faced *termination*, respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all"). Administrative suspensions, unlike terminations, are by their nature temporary and merely allow employers to conduct investigations without further exposure to the alleged misconduct.

Third, this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), specifically took into account a university's process for reviewing and approving tenure recommendations in determining when the statute of limitations began to run. In that case, this Court affirmed the district court's determination that the limitations period did not begin to run until more than a year after the initial tenure recommendation had elapsed. *Id.* at 261–62. Under the Sixth Circuit's rationale, however, the limitations period in that case would have started running much earlier, for even a preliminary recommendation against tenure would

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[2] The Sixth Circuit's reliance on *Robbins* is particularly inappropriate in light of this Court's observation in that case that the issue of when the relevant conduct occurred was "raised by petitioners for the first time before this Court." 429 U.S. at 235 & n.7.

have constituted an adverse employment action. *See* Pet. App. at 21a n.7.

This Court has never held that decisions falling short of actual termination, demotion, or failure to promote are initially sufficient to trigger the relevant statute of limitations because those decisions are adverse employment actions as a matter of law.[3] Even if it had, that would not necessarily establish that a suspension that is later vacated, with full reinstatement and backpay, by the employer should *remain* a proper predicate for a subsequent retaliation claim. The Sixth Circuit's holding conflicts with the settled law of several other circuits.

II. THE CURRENT CONFLICT IN THE CIRCUITS CREATES SERIOUS DIFFICULTIES FOR ALL LARGE EMPLOYERS, AND FOR RAILROADS IN PARTICULAR

A. Employers Need A Clear And Uniform Nationwide Standard

This Court recognized in *Ellerth* that "a uniform and predictable standard must be established as a matter of federal law" where the federal courts are called upon to give meaning to Title VII's provisions. 524 U.S. at 754–55 (establishing agency principles applicable to all Title VII sexual harassment claims). As this Court has noted in other related contexts, a "clear and particularized policy—one which 'effectively communicates'" the applicable standard—is necessary to protect employers from "the imposition of massive and unanticipated" liability. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (upholding regulations exempting petitioners from overtime pay requirements of the Fair Labor Standards Act). Indeed, employees also benefit from the establishment of clear employment law standards

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[3] The Sixth Circuit's assertion that the "ultimate employment decision" test contravenes Title VII's goals of "'mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination,'" Pet. App. at 22a–23a (citation omitted), simply assumes the question to be decided: What constitutes "unlawful employment discrimination"?

because the existence of these standards "create[s] and fulfill[s] employee expectations of fair, uniform treatment." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002).

The standard for determining what kinds of employer decisions are serious and final enough to support a federal retaliation lawsuit is critically important to employers when deciding how much authority line supervisors in the field can be permitted to exercise over any employee who has ever made a discrimination complaint. If that threshold is set too low, then companies will have a strong incentive to require that any changes or disciplinary actions be approved by management or entrusted to a formal disciplinary process in the first instance. That incentive is heightened if, as the Sixth Circuit held, a later reversal of the decision by management will not eliminate the risk of a Title VII lawsuit. A clear and uniform nationwide resolution of the questions presented by this case is therefore critically important to large employers, which frequently have operations stretching across multiple jurisdictions and federal circuits.

That is, of course, particularly true of railroads. BNSF's rail operations, for instance, stretch across the western two-thirds of the United States. In its Northwest #100 seniority district, which includes five states in the Ninth Circuit, the current governing law would discourage vesting any meaningful discretion in its line supervisors over any employee who has ever made a complaint about discrimination.[4] In BNSF's Fargo #300 seniority district in the Eighth Circuit, however, the company could confidently vest significant day-to-day discretion in its supervisory personnel, for only if a decision amounts to an "ultimate employment decision" would it trigger potential Title VII liability for retaliation. *Ledergerber*, 122 F.3d at 1144. The

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[4] A "seniority district" is generally the relevant employee subdivision for railroads. It is defined by the geographical reach of the various collective bargaining agreements to which the rail company is a party.

legal landscape for BNSF is even more complicated for seniority districts that reach across multiple circuits. Its Lincoln #400, Kansas #700, and Texas #800 seniority districts, for example, include states in the "intermediate" Tenth Circuit (where "the employer's conduct must be 'materially adverse' to the employee's job status" to support a retaliation claim, *Medina*, 413 F.3d at 1136), *and* states in the strict Fifth or Eighth Circuits. Indeed, this case demonstrates the disparate standards that may apply even to the same operational unit. This case presumably fell within the jurisdiction of the Sixth Circuit because Respondent was primarily assigned to the Maintenance of Way department at BNSF's Tennessee Yard. The incident giving rise to Respondent's temporary suspension for subordination, however, occurred while Respondent was supporting a regional tie gang in Blytheville, Arkansas, within the jurisdiction of the Eighth Circuit.

Obviously petitioner BNSF and AAR's other member-railroads cannot structure their employment policies to account for all of these inconsistencies. The practical effect of the confusion among the circuits, especially in light of an employer's potential liability for punitive damages, is that many interstate employers will be forced to adopt uniform nationwide policies that are driven by the particularly unfavorable law of the Ninth and Sixth Circuits—and that therefore place an excessive premium on avoiding litigation as opposed to effective and immediate supervision of employees. A clear and uniform determination from this Court is essential so that national employment policy is not effectively set by outlying decisions in two of the federal courts of appeals.

B. The Sixth Circuit's Holdings Discourage Adoption Of Employment Policies Most Consistent With The Safe And Efficient Operation Of The Nation's Railroads

AAR respectfully submits that this Court, in setting a uniform nationwide rule, should reject the two holdings of the Sixth Circuit in this case and adopt the "ultimate

employment decision" standard articulated by the Fifth and Eighth Circuits. The Sixth Circuit's threshold for what constitutes an actionably adverse change in the terms and conditions of employment is far too low, and its holding that allegedly retaliatory decisions cannot be "cured" by senior management after the fact (even if full backpay is paid) irrationally discourages companies from adopting vigorous internal review mechanisms. Those holdings have far reaching, adverse implications for the structuring of employment relationships in general, and on the management of the Nation's railroads in particular.

By according extraordinary weight to the subjective perceptions of employees regarding the desirability of particular tasks they are assigned to perform, the Sixth Circuit's decision promises to inundate the courts with litigation over trivial disputes and otherwise ordinary workplace interactions that should not be the subject of federal civil rights actions. This will enmesh employers in lengthy and costly litigation, in which they will often be unable to obtain judgments as a matter of law prior to trial because the lawsuits will inevitably turn on factual disputes about the supervisor's motive. Plaintiffs can easily allege, and juries can easily conclude, that a discriminatory intent motivated some resented request by a supervisor whenever the employee had previously made a complaint about alleged discrimination. The Sixth Circuit's decision imposes unwarranted litigation burdens on companies for "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

Indeed, the Sixth Circuit's standard, and the even less demanding test advocated by the Ninth Circuit and the EEOC, are hard to square with this Court's repeated holdings that sexual harassment does not alter the terms and conditions of employment unless it is sufficiently "severe" or "pervasive" to create an *objectively* "hostile working environment." *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard was designed to

identify workplace conduct that, although perhaps offensive, is not serious enough to justify federal litigation. If relentless sexual innuendo cannot be actionable as discrimination unless it renders the overall environment severely or pervasively hostile, it is not clear why much less harmful conduct should be actionable when it is alleged to be retaliatory.

Perhaps more importantly, the Sixth Circuit and Ninth Circuit standards place employers in the untenable position of being unable to supervise employees who have arguably engaged in protected activity. Any perceived slight could be grounds for a retaliation suit, inevitably making employers cautious about the authority they entrust to supervisors, and making supervisors cautious about exercising whatever authority they retain. That caution will be exaggerated by the Sixth Circuit's other holding that retaliatory actions cannot be "cured" even when they are later completely reversed, with backpay, by the review of more senior management. Both of the Sixth Circuit's holdings in this case accordingly undermine an employer's ability to vest meaningful, immediate supervisory authority in its front-line supervisors, and hamper the ability of supervisors to respond to circumstances requiring immediate and decisive action.

Such excessive caution may be harmless in some industries, but it poses serious problems for the safe and efficient operation of the Nation's railroads. First, safety requires all rail employees, especially line supervisors, to act quickly and decisively to respond not only to clear emergencies, but also to situations that call for an exercise of judgment but may present a serious threat to the safety of the public and rail workers alike. A supervisor may, for example, be called to respond to circumstantial evidence of employee drug or alcohol abuse, and his or her decision may be based on nothing more than an assessment of an employee's appearance or demeanor. Or a supervisor may be required to draw a line between a difference in opinion and outright insubordination. In situations in which the

slightest error in judgment can ripple into a deadly accident, a supervisor must have the latitude to err on the side of safety. This is particularly true given the decentralization and wide dispersion of railroad operations. Railroads of necessity rely on their line supervisors to enforce the myriad safety and operational rules applicable to the nearly 140,000 miles of rail in the United States and tens of thousands of rail employees in the first instance. *Cf.* BNSF Maintenance of Way Operating Rules § 1.13 (eff. Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/MWSafety2004.pdf ("Employees will report to and comply with instructions from supervisors who have the proper jurisdiction.").

The Sixth Circuit's decision adversely affects the ability of supervisors to exercise this critical discretion where the employee involved previously has engaged in activity arguably protected by Title VII. An employer reasonably may withhold from the supervisor the necessary authority to temporarily reassign or suspend *any* employee when the result of an error may be Title VII liability for compensatory as well as punitive damages for retaliation—or at least involvement in costly and time-consuming litigation. Yet in these circumstances only a swift reassignment or suspension may avert a real threat to safety.

It is no answer to suggest (as did the Sixth Circuit, at Pet. App. at 24a) that employers should simply suspend employees with pay. As an initial matter, it is far from clear that such action would not be found to constitute an adverse employment action under the Sixth Circuit's rationale. And as the petition discusses, this approach imposes an unfair and substantial economic burden on employers, who would have to continue paying every suspended employee (as well as the other employees filling in for them) but would not have the practical ability to recover the money where, as in

most cases, the suspension is upheld and the employee is eventually terminated. *See* Pet. at 20.[5]

Second, prior management review of the reassignment of individual employees to different tasks within their understood job responsibilities simply is not practical in the railroad context. The tasks of rail employees engaged in operations and maintenance are of necessity not static; the location, difficulty, physical demands, required technical skill, and other aspects of the individual tasks they may be expected to perform vary, depending on operational needs and the workforce management decisions of supervisors, on a day-to-day basis. Maintenance-of-way crews, for instance, may operate rail test cars, perform necessary defective rail changes, correct track geometry defects, or make emergency repairs caused by derailments or adverse weather conditions on any given day. *See Practical Guide To Railway Engineering* 36 (Am. Ry. Eng'g & Maint. Of Way Ass'n ed., 2d ed. 2003). Each of these jobs in turn may require individual members of the crew to perform a wide variety of different tasks, and railroads hire these employees to do just that.

The Sixth Circuit's overly rigid view of what constitutes a "reassignment," and the court's undue deference to the subjective desires of an employee to perform some, but not all, of the tasks associated with her job, intrude upon the fundamental prerogative of supervisors to assign (and reassign) employees to meet operational needs. Under the Sixth Circuit's view, employees simply could file discrimination charges and be able to decline to perform duties that they subjectively dislike but that would

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[5] *Cf. Homar*, 520 U.S. at 932 (rejecting due process challenge of state employee who was suspended without pay following his arrest on felony drug charges and noting, "We think . . . that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him").

otherwise be part of the universe of tasks the employer hired them to carry out. The Sixth Circuit's decision thus creates an incentive for employees to file discrimination charges in an effort to entrench themselves in choice positions or "cherry pick" the tasks they like best, and hinders the ability of employers to manage their workforce efficiently. This Court has admonished that Title VII was "not intended to diminish traditional management prerogatives," *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), and that no employee should be able to place himself "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

The Sixth Circuit's parallel holding that a temporary suspension or reassignment cannot be cured by management's subsequent decision to reinstate the employee (with full backpay) exaggerates these perverse incentives and discourages internal efforts to identify and redress statutory violations without litigation. The Sixth Circuit correctly noted that an employee who is wrongly suspended and subsequently reinstated, with backpay, may nonetheless have suffered some inconvenience and expense. But that is a small price to pay for a rule that encourages employers to seek out and confess error, and saves all parties and the federal courts the burden of litigation. Indeed, the Sixth Circuit's holding perversely punishes employers for maintaining honest and rigorous internal grievance and review procedures, because a full reinstatement with backpay will no doubt be interpreted by a subsequent jury as a concession that the initial suspension was unjustified—and hence presumptively discriminatory or retaliatory. At a minimum, plaintiffs can be expected to make that argument. As this Court recognized in *Ellerth* and its companion case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–07 (1998), the broad language of Title VII deliberately entrusts this Court with discretion to fashion

sensible rules that "promote conciliation rather than litigation," *Ellerth*, 524 U.S. at 764, and encourage employers to pursue prophylactic measures that minimize the need for federal intervention. No sensible policy is furthered by punishing an employer for acknowledging that, despite a supervisor's initial judgment that a suspension or reassignment was warranted at the time, that judgment was an overreaction and the employee should be fully reinstated. The Sixth Circuit's decision constitutes an unwarranted extension of Title VII and an impermissible intrusion into the employment relationship that, in the rail context, could threaten public safety.[6]

CONCLUSION

For the foregoing reasons, the Association of American Railroads respectfully urges this Court to grant the petition for certiorari and reverse the decision of the Sixth Circuit.

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[6] While AAR in this brief has focused on the retaliation issue, it also strongly supports certiorari on the second question presented for review—whether a stand-alone retrial on punitive damages under a preponderance-of-the-evidence standard is appropriate in these circumstances—for the reasons stated in the petition.